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Ozburn-Hessey Logistics, LLC and United Steelworkers Union. Cases 26–CA–024057, 26–CA–024065, 26–CA–024090, and 26–RC–008635

November 17, 2014

DECISION, ORDER, AND CERTIFICATION
BY CHAIRMAN PEARCE AND MEMBERS HIROZAWA
AND SCHIFFER

On May 2, 2013, the Board issued a Decision, Order, and Direction in this proceeding, which is reported at 359 NLRB No. 109 (2013).¹ Thereafter, the Respondent filed a petition for review in the United States Court of Appeals for the District of Columbia Circuit.

At the time of the Decision, Order, and Direction, the composition of the Board included two persons whose appointments to the Board had been challenged as constitutionally infirm. On June 26, 2014, the United States Supreme Court issued its decision in *NLRB v. Noel Canning*, 134 S.Ct. 2550 (2014), holding that the challenged appointments to the Board were not valid. On June 27, 2014, the Board issued an order setting aside its Decision, Order, and Direction and retained this case on its docket for further action as appropriate.²

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

In view of the decision of the Supreme Court in *NLRB v. Noel Canning*, supra, we have considered de novo the judge's decision and the record in light of the exceptions and briefs. We have also considered the now-vacated Decision, Order, and Direction, and we agree with the rationale set forth therein.³ Accordingly, we affirm the judge's rulings, findings, and conclusions and adopt the judge's recommended Order to the extent and for the reasons stated in the Decision, Order, and Direction reported at 359 NLRB No. 109, which is incorporated herein by reference.⁴

¹ On May 13, 2013, the Board issued an Order denying the Respondent's emergency motion to stay the opening and counting of ballots. We agree with that denial for the reasons stated in the Board's Order.

² Accordingly, on August 18, 2014, on motion by the Board, the court of appeals dismissed the case.

³ In finding that the Respondent's interrogation of employee Sharon Shorter also created an impression of unlawful surveillance, we rely on *Conley Trucking*, 349 NLRB 308, 315 (2007), *enfd.* 520 F.3d 629 (6th Cir. 2008). We do not rely on *McClain & Co.*, 358 NLRB No. 118 (2012), cited in the vacated Decision, Order, and Direction.

⁴ We shall modify the judge's recommended Order and notice in accordance with our recent decisions in *Don Chavas, LLC d/b/a Tortillas*

The Decision, Order, and Direction adopted, *inter alia*, the administrative law judge's resolution of 10 challenged ballots. Having also adopted that resolution herein, our normal practice would be to direct the Regional Director to open and count the challenged ballots, to prepare and serve on the parties a revised tally of ballots, and to issue an appropriate certification. However, the Regional Director has already performed these ministerial tasks in response to the Board's original Decision, Order, and Direction, and we see no purpose to be served by requiring the Regional Director to repeat them. Thus, the revised tally of ballots that issued on May 14, 2013, accurately presents the results of the election, and the Certification of Representative issued by the Acting Regional Director on May 24, 2013, is based upon the valid votes cast. The revised tally shows 169 for and 166 against the Petitioner, with no challenged ballots. There is no question that a majority of valid ballots was cast for the Union, and there is no question that the certification issued by the Acting Regional Director is substantively correct. Nevertheless, in an abundance of caution and in an effort to avoid further litigation that would only serve to further delay this matter, we will issue a new Certification of Representative.

ORDER

The National Labor Relations Board orders that the Respondent, Ozburn-Hessey Logistics, LLC (OHL), Memphis, Tennessee, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Threatening employees with discipline and other unspecified reprisals if they engage in union or other protected concerted activities.

(b) Interrogating employees concerning their union or other protected concerted activities.

(c) Engaging in surveillance of employees' union or other protected concerted activities.

(d) Creating the impression that employee union activities are under surveillance.

Don Chavas, 361 NLRB No. 10 (2014), and *Durham School Services*, 360 NLRB No. 85 (2014).

In adopting the judge's recommendation to include a notice reading remedy, we do not rely on *Jason Lopez' Planet Earth Landscape*, 358 NLRB No. 46 (2012), cited in the vacated Decision, Order, and Direction. In modifying the judge's remedy to permit the Respondent, at its option, to have its managers, Senior Vice President of Operations Randall Coleman and Director of Operations Phil Smith, read the notice aloud to employees during working time in the presence of a Board agent, or to permit a Board agent to read the notice aloud to employees in those managers' presence, we rely on *HTH Corp.*, 356 NLRB No. 182, slip op. at 8 (2011), *enfd.* 693 F.3d 1051 (9th Cir. 2012). We do not rely on *Marquez Bros. Enterprises*, 358 NLRB No. 61 (2012), cited in the vacated Decision, Order, and Direction.

(e) Confiscating union materials and related documents from employee break areas.

(f) Telling employees who support the Union to resign.

(g) Terminating, issuing final warnings, or otherwise disciplining employees for engaging in union activities.

(h) In any other manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of the Board's Order, offer Carolyn Jones full reinstatement to her former job or, if such job no longer exists, offer her a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Carolyn Jones whole for any loss of earnings and benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of the Board's Order, remove from its files any reference to Carolyn Jones' unlawful discharge, and Jennifer Smith's unlawful final warning, and within 3 days thereafter notify them in writing that this has been done and that their discipline will not be used against them in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the backpay amounts due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its Memphis, Tennessee facility copies of the attached notice marked "Appendix."⁵ Copies of the notice, on forms provided by the Regional Director for Region 26, after being signed by OHL's authorized representative, shall be physically posted by OHL and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted.

ed. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by OHL to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, OHL has gone out of business or closed the facility involved in these proceedings, OHL shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by it at the facility at any time since April 11, 2011.

(g) Within 14 days after service by the Region, hold a meeting or meetings at the facility, during working hours, which will be scheduled to ensure the widest possible attendance, at which the attached notice marked "Appendix" is to be read to the unit employees by Randall Coleman and Phil Smith in the presence of a Board agent, or, at the Respondent's option, by a Board agent in those officials' presence.

(h) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

CERTIFICATION OF REPRESENTATIVE

IT IS CERTIFIED that a majority of the valid ballots have been cast for United Steel, Paper & Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers, and that it is the exclusive collective-bargaining representative of the employees in the following appropriate unit:

All full time custodians, customer service representatives, senior customer service representatives, cycle counters, inventory specialists, maintenance, maintenance techs, material handlers, operators 1, operators 2, operators 3, quality assurance coordinators, returns clerks, and team leads employed by the Employer at its Memphis, Tennessee facilities located at: 5510 East Holmes Road; 5540 East Holmes Road; 6265 Hickory Hill Road; 6225 Global Drive; 4221 Pilot Drive; and 5050 East Holmes Road. Excluded: All other employees, including office clerical and professional employees, guards, and supervisors as defined in the Act.

⁵ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

Dated, Washington, D.C. November 17, 2014

Mark Gaston Pearce, Chairman

Kent Y. Hirozawa, Member

Nancy Schiffer, Member

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES

POSTED BY ORDER OF THE

NATIONAL LABOR RELATIONS BOARD

An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT threaten you with discipline and other unspecified reprisals because you support the United Steelworkers Union (the Union) or any other union.

WE WILL NOT interrogate you about your union activities.

WE WILL NOT engage in surveillance of your union activities.

WE WILL NOT create the impression that your union activities are under surveillance.

WE WILL NOT confiscate union materials and related documents from employee break areas.

WE WILL NOT tell employees who support the Union to quit.

WE WILL NOT fire you, issue final warnings, or otherwise discriminate against you because you support the Union or any other union.

WE WILL NOT in any other manner interfere with, restrain, or coerce you in the exercise of the rights described above.

WE WILL, within 14 days from the date of this Order, offer Carolyn Jones full reinstatement to her former job or, if her job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Carolyn Jones whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL compensate Carolyn Jones for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

WE WILL, within 14 days from the date of this Order, remove from our files any reference to the unlawful discharge of Carolyn Jones and the unlawful written final warning to Jennifer Smith.

WE WILL, within 3 days thereafter, notify Carolyn Jones and Jennifer Smith in writing that this has been done and that the discharge and final warning will not be used against them in any way.

WE WILL hold a meeting or meetings at the facility, during working hours, at which this notice will be read aloud to you by Randall Coleman and Phil Smith (or the current senior vice president of operations and director of operations), in the presence of a Board agent, or by a Board agent in those officials' presence.

OZBURN-HESSEY LOGISTICS, LLC

The Board's decision can be found at <http://www.nlrb.gov/case/26-CA-024057> or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

